

**Royal Commission into Misconduct in the Banking, Superannuation and Financial Services
Industry**

Aussie Home Loans

Round 1 Hearing - Consumer Lending Closing Submissions

Part A

3 April 2018

Introduction

1. AHL Investments Pty Ltd (**AHL**) concedes the incidents of misconduct described in the revised table provided to the Commission on 23 March 2018 (T970.16-.25). AHL also accepts Counsel Assisting's description of the fraudulent conduct by the four (4) AHL credit representatives (**Four Brokers**) the subject of the case study (T982.38-.44), as being conduct that was misleading, deceptive and unconscionable (T984.40-.42).
2. AHL submits that the proposed findings of misconduct by AHL (listed from T984.6-T985.11) are not warranted on the basis advanced. The misconduct findings alleged against AHL were not particularised, nor articulated, by reference to "*the evidence*" before the Commission, despite ranging from alleged breaches by AHL of the *National Consumer Credit Protection Act* 2010 (**NCCPA**) to alleged breaches of AHL's obligations imposed by the Code of Practice of the Mortgage & Finance Association of Australia (**MFAA**).
3. Procedural fairness safeguards arise before a Commission may be minded to make findings of unlawful activity.¹ It is not up to AHL to speculate which portions of "*the evidence*" are contended to support which element of alleged misconduct, particularly when (as addressed below), an asserted factual premise is mistaken or not available. AHL submits that it is not open to the Commission to find that AHL:
 - (a) breached its statutory obligation under s 47(1)(a) of the NCCPA to do all things necessary to ensure that its credit activities were engaged in efficiently, honestly and fairly (*cf* T984.5-.10);
 - (b) breached its obligation under s 47(1)(b) of the NCCPA to have in place adequate arrangements to ensure that AHL clients were not disadvantaged by any conflict of interest that may arise in relation to AHL credit activities (*cf* T984.10-.14);
 - (c) breached the obligation under s 47(1)(b) of the NCCPA to take reasonable steps to verify the financial situation of customers (*cf* T984-.14);
 - (d) breached its obligation under s 47(1)(i)(ii) of the NCCPA to have adequate risk management systems (*cf* T984.21-.23);
 - (e) breached the obligation in s 117(1)(a) of the NCCPA to take reasonable steps to verify the financial situation of customers prior to making the assessment of whether the home loans

¹ *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 578.

- for which it assisted customers to apply would be unsuitable for the customers (*cf* T984.36-.39);
- (f) engaged in conduct involving lenders and conduct involving customers that was misleading, deceptive and unconscionable (*cf* T984.40-.42);
 - (g) failed to comply with the expectations of ASIC in relation to responsible lending as set out in RG 209 (*cf* T984.42-45);
 - (h) breached the obligations imposed on it by the MFAA Code of Practice (*cf* T985.1-.2).
4. Counsel Assisting also proposed adverse findings concerning AHL’s systems, processes and culture (T985.34-986.34); and that, in three respects, AHL’s conduct fell below “community standards and expectations” (T985.13-.32). In summary, AHL submits that the following findings are available on the evidence:
- (a) the fraudulent misconduct of the Four Brokers was not permitted to occur by the systems, processes and culture at AHL (*cf* T985.35-.36);
 - (b) AHL’s culture did not prioritise selling home loans over a proper customer assessment of the customer’s requirements and objectives (*cf* T985.40-.44);
 - (c) AHL effectively and adequately responded to the potential detriment suffered by customers affected by the fraudulent misconduct (*cf* T986.18-.19);
 - (d) AHL adequately responded to the danger posed to other future customers by its reporting of misconduct (*cf* T986.26-.28);
 - (e) AHL appropriately advised its customers (*cf* T985.14-.18);
 - (f) AHL did not prioritise retention of its trailing commissions (*cf* T985.18-.21); and
 - (g) AHL’s lodgement of its 2014-2015 Annual Compliance Certificates did not fall below community standards and expectations (*cf* T985.23-.32).

AHL’s systems, processes, and culture

5. The Commissioner should not find that the misconduct of the Four Brokers arose “*not merely because of rogue conduct by individual brokers but because the systems, processes and culture at Aussie Home Loans permitted such conduct to occur*” (T985.34-.36), nor (inferentially) that such a finding indicates that AHL did not comply with its general conduct obligations, including to do all things necessary to ensure that its credit assistance activities were engaged in efficiently, honestly and fairly (s 47(1)(a)), to take reasonable steps to ensure that its representatives complied with the NCCPA (s 47(1)(e)); or to have adequate risk management systems (s 47(1)(l)(ii)). AHL submits that a finding that AHL failed to comply with its general conduct obligations is not available on the evidence before the Commission, including with respect to the matters concerning AHL’s systems, processes and culture asserted at T985.36-T986.34.
6. It is to be recalled that the adequacy of systems and processes to ensure that credit activities are engaged in efficiently, honestly and fairly is to be determined by “*the nature, scale and*

complexity of the credit activities engaged in by the licensee".² The nature and complexity of the credit activities engaged in by mortgage brokers is materially different to the nature and complexity of the credit activities engaged in by credit providers. The difference in the nature, scale and complexity of the activities of mortgage brokers and credit providers is recognised by the NCCPA obligation on mortgage brokers (as credit *assistance* providers) to make "*preliminary assessment*" and the NCCPA obligation on credit providers to make a "*final assessment*" about whether the particular credit contract will not be unsuitable. What constitutes reasonable inquiries and steps to verify information is different for credit assistance providers and credit providers.

7. AHL submits that, at each stage of the Aussie Broker lifecycle, from recruitment through to termination, the systems, processes and culture of AHL adequately provided for the prevention, detection and response, to the risks of broker misconduct. It is no criticism of its past systems, processes or culture, that AHL has committed (and continues to commit) significant resources to enhance and update those systems and processes as part of its elevation to the risk governance standards of its parent CBA, which is a credit provider (as distinct from a credit *assistance* provider), an Australian Financial Services Licensee and an APRA regulated Authorised Deposit-taking Institution (ADI).³
8. *First*, none of AHL's systems and processes *permitted* (in the sense of *authorised*) such fraudulent conduct to occur. All Aussie Brokers are bound to act honestly by the terms of their contract with AHL⁴ and by their authorisation as a credit representative of AHL. This was and is

² See s 47(2) of the NCCPA and ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations*, at [205.22] – [205.23].

³ As an ADI, CBA is subject to APRA *Prudential Standard CPS 220 - Risk Management*. However, the obligation to apply CPS 220 is matter for CBA - not AHL (cf T.986.9-.14). Thus, it was CBA's requirement that AHL introduce a written *Responsible Lending Policy*, but that was to formalise and document a process already in place: T404.13-.19 (G Boddy). There was no reference to lack of controls to ensure responsible lending in CBA's previous internal audit: T404.5-.26 (G Boddy). The systems used by AHL to ensure compliance by Aussie Brokers with responsible lending requirements is a system integrated within Toolbox. In filling in the electronic application, Aussie Brokers are prompted to answer questions. To fulfil requirements on customer information, Toolbox allows a broker to "sight" or "rely on" documentation. In such circumstances, the documentation sighted is not necessarily copied and kept on the system but rather, a box is checked confirming that it has been sighted. As copies of the documentation are not kept in all circumstances, the CBA internal audit concluded that "*the brokers did not capture enough information*" in order to fulfil AHL's responsible lending obligations - but this analysis proceeded from an incorrect assumption, namely the requirements of a credit provider as opposed to a credit *assistance* provider. Based upon this process, the conclusion cannot be drawn that an absence of records on file means non-compliance given the Toolbox process. Rather, the absence of stored documentation is relevant to whether compliance could be proved, and whether AHL can effectively monitor that compliance. That is why, as addressed further below, AHL mandated 100% compliance for scanning of broker files. CBA internal audit also classified AHL's Reporting (internal) on File Testing and Escalation process for unsatisfactory brokers as "Design Effective": [Ex 1.74] [CBA.0506.0001.0014] at [CBA.0506.0001.0035].

⁴ See, for example, AHL Core Independent Contractor Agreement between AHL and Nair signed 22.9.08 [Ex 1.67] [AHL.0001.0001.4501] clauses: 3.1(a) & (d) (act properly and carefully and in full compliance with all relevant legislation at all times in providing services); 3.8 (not do anything to bring AHL's name into disrepute); 3.12(b) (comply with and remain updated on all relevant legislation); 3.12(c) (comply with all requirements and procedures specified by AHL panel lenders); 3.12(f) (not pay any money or any benefit in relation to the referral of a loan to AHL); 3.12(i) (provide AHL with all reasonable access to documents and records to ensure compliance with obligations and law); 17.1(j) immediate termination in the event of, *inter alia*, fraud, misconduct or dishonesty.

reinforced by AHL's *Fraud and Suspect Transaction Reporting Guide*⁵ and *Keep Aussie Safe*⁶ protection policies. AHL's leadership have uniformly and repeatedly expressed a policy of zero tolerance for fraud and dishonesty.⁷

9. *Second*, at the relevant times from 2013, the *selection* of new Aussie Brokers was (and is) designed to prevent fraudulent or other dishonest persons being accredited as Aussie Brokers in the first place.⁸ To become accredited, each new Aussie Broker was, and continues to be required to:
- (a) pass all criminal and credit checks, thus preventing those with criminal histories and personal financial burdens from becoming Aussie Brokers⁹;
 - (b) complete a 3 week (now 4) Aussie Induction Program, which included not only training on the compliance issues, but also including a requirement to demonstrate appropriate behaviour;¹⁰
 - (c) pass accreditation requirements of each of the eligible AHL panel lenders, thus subjecting all prospective Aussie Brokers to the checks and scrutiny of up to an additional 21 credit providers, and requiring completion of up to a further 21 additional lender accreditation modules;¹¹ and
 - (d) complete a Certificate IV in Finance and Mortgage Broking (now within 12 months), which includes components on responsible lending (RG209), customer declared living expenses, compliance, fraud, NCCPA, Privacy and conflicts of interest.¹²

⁵ L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-5 [AHL.0001.0002.0055].

⁶ L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-6 [AHL.0008.0001.0924].

⁷ L Harris [Ex 1.41] [CBA.0517.0003.0001] at Ex LH-5 [AHL.0001.0002.0055] (Fraud & Suspect Transactions Reporting Guide dated 9.8.12): "*Aussie maintains a 'zero tolerance' to fraud and dishonesty within the business. Aussie requires all its representatives to act with the highest level of professionalism, honesty and integrity*"; see also [AHL.0001.0001.5034] (Media Release re Nair dated July 2016); [AHL.0001.0001.0042] (email to all Aussie Brokers, Franchisees and Team Members 'Statement in response to ASIC charges' dated 8.7.16).

⁸ The rigorous process for "on-boarding" and accreditation of brokers, including the staged process of conducting background and compliance checks, training, MFAA and lender accreditations as it currently applied is set out in a flowchart at [AHL.0002.0001.2700]; see also L Harris [Ex 1.41] [CBA.0517.0003.0001] at Ex LH-2. The current process is set out at [15]-[22] L Harris [Ex 1.41] [CBA.0517.0003.0001] with changes to the process since 2013 noted at [26] L Harris [Ex 1.41] [CBA.0517.0003.0001] and Ex LH-4 [AHL.0008.0002.0118]. In the relevant period, brokers were also required to sign a separate acknowledgment that all accreditation and training requirements had been met: see, for example, Schedule C to Aussie Core Independent Contractor Agreement between AHL and Khalil [Ex 1.68] [AHL.0002.0001.3285] at .3304.

⁹ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [15(d)].

¹⁰ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [17]; [AHL.0001.0001.1489]; [AHL.0006.0001.1214] ("NCCP: Responsible Lending" learning modules One and Two).

¹¹ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [22]; see, for example, Aussie Core Independent Contractor Agreement between AHL and Nair signed 22.9.08 [Ex 1.67] [AHL.0001.0001.4501] clauses: 3.2(a)(ii) and (vii) and 3.2(b).

¹² See FNS40815 Certificate IV in Finance and Mortgage Broking: Facilitator Guide and Course Outline: Session 4: Risk & Compliance [AHL.0003.0001.1715] at .1735 to .1746. See also program participant work book [AHL.0001.0001.0396] at .0424 to .0425.

10. *Third*, accredited Aussie Brokers were (and are) subject to requirements designed to prevent dishonest and fraudulent conduct.¹³ To *maintain accreditation* an Aussie Broker was (and is) required to:

- (a) complete all modules required for the Diploma of Finance and Mortgage Broking Management, including those concerning honesty and fair dealing;¹⁴
- (b) maintain accreditation with all eligible AHL panel lenders;¹⁵
- (c) complete AHL's NCCPA training and compliance modules annually;¹⁶
- (d) complete a minimum of 30 hours of Continuing Professional Development annually;¹⁷ and
- (e) maintain membership with the MFAA and complete the required MFAA online training module annually.¹⁸

11. *Fourth*, AHL's systems and processes provided for the *continuing* accreditation of each Aussie Broker, to be *monitored* including through:

- (a) SkillsSoft, which automatically logs completion of online modules and produces daily reports on any Aussie Brokers who have not completed training by the required deadline;¹⁹ and
- (b) the mandatory submission of an annual attestation, including in relation to the status of any licences held, matters relating to credit, regulatory or criminal matters and banning or disqualification orders by relevant authorities.²⁰

12. *Fifth*, accredited Aussie Brokers were (and are) themselves subject to *monitoring* and *supervision* through their mandatory participation in the Aussie Mentoring Program,²¹ a program by which AHL chooses experienced Aussie Brokers, Mobile Business Leaders (**MBLs**), Retail Business Consultants (**RBCs**) and State Managers to mentor Aussie Brokers in best practice. AHL's mentoring program has been accredited by the MFAA and each of the mentors involved has been approved by the MFAA.²² In accrediting the Aussie Mentoring Program, the MFAA reviewed and

¹³ These are set out at L Harris [Ex 1.41] [CBA.0517.0003.0001] at [23]-[25].

¹⁴ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [29(b)].

¹⁵ See, for example, Aussie Core Independent Contractor Agreement between AHL and Nair signed 22.9.08 [Ex 1.67] [AHL.0001.0001.4501] clauses: 3.2(b); 17.1(n).

¹⁶ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [23(d)].

¹⁷ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [23(e)]; ASIC RG 206 requires at least 20 hours of continuing professional development for third-party home loan credit assistance providers.

¹⁸ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [23(d)].

¹⁹ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [178(p)].

²⁰ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [23(c)].

²¹ Described at L Harris [Ex 1.41] [CBA.0517.0003.0001] at [26(c)] and [27]; and at FSN 40815 Certificate IV in Finance and Mortgage Broking Participant Workbook [AHL.0003.0001.1079] at .1088.

²² L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-3 [AHL.0008.0015.0057].

assessed the program concept, structure, and schedule as well as the approach taken by AHL and related documentation.²³ The MFAA has continued to accredit the Aussie Mentoring Program annually since 2014 on the basis of the MFAA’s review of course material and mentee references.

13. *Sixth*, AHL’s systems and processes provided appropriate mechanisms to encourage the *reporting* internally of any suspect activity, fraud, or dishonest activity. AHL’s *Fraud and Suspect Transaction Reporting Guide*²⁴ implemented in 2012 required same-day notification to the AHL Risk Management Team of suspect activity, fraud, or dishonest activity, and in 2014 AHL employees, directors and contractors were provided with an independent anonymous “*keep Aussie safe*” hotline.²⁵
14. *Seventh*, AHL established systems and processes for *managing* incidents resulting from inadequate or failed internal processes, people, or systems including misconduct or fraud.²⁶
15. *Eighth*, AHL established systems and processes for *communicating* with regulators in relation to misconduct.²⁷
16. *Ninth*, AHL established systems and processes for requiring *disclosure* of potential conflicts of interest, including of relationships²⁸ with, and gifts²⁹ from, third parties which might create an incentive for fraudulent conduct. These form part of AHL’s arrangements to ensure that customers are not disadvantaged by a conflict of interest that may arise in relation to AHL credit activities.³⁰
17. *Tenth*, AHL established systems and processes for requiring *customer complaints* about Aussie Brokers to ensure these were handled fairly and consistently, in a manner which escalated to AHL management poor practices and in accordance with ASIC Regulatory Guide 165.³¹ Those systems and processes included (and still include) measures to incentivise focus on good sales conduct and positive customer outcomes, such as by garnishing from Aussie Broker commissions payments where misconduct or poor practices are identified and require investigation.³²

²³ After reviewing this material in October 2014, the MFAA thanked AHL for its “*commitment for improving the standards of mentoring across our industry.*” (*ibid*).

²⁴ L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-5 [AHL.0001.0002.0055].

²⁵ L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-6 [AHL.0008.0001.0924].

²⁶ L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-10 [AHL.0008.0001.0955]. The Risk Management Framework established in 2014 was designed to align AHL practices with CBA operational risk management and compliance risk management frameworks.

²⁷ L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-13 [AHL.0008.0003.0033], noting that the Australian Credit Licensing regime does not mandate breach reporting to ASIC, and that the forms prepared by ASIC for annual compliance certification do not require optional breach reporting.

²⁸ L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-7 [AHL.0008.0001.0968].

²⁹ L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-9 [AHL.0008.0001.0940].

³⁰ Section 47(1)(b) of the NCCPA.

³¹ L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-8 [AHL.0008.0001.0930].

³² See instances referred to in the Table of Misconduct provided to the Commission on 23 March 2018., items 3, 5, 9, 11, 13, 14, 37, 38, 39, 41 and 77.

18. *Eleventh*, AHL had an established system and process for *managing the risk*³³ which appropriately identified the risk of fraudulent conduct by brokers, declared that AHL had no appetite for such risk, and that such conduct was not within AHL's risk tolerance.
19. *Twelfth*, AHL had an established system and process of routine or targeted "*first line file reviews*" conducted by the franchisees, RBCs and MBLs, which were capable of detecting, and thus helping to deter, fraud or misconduct by Aussie Brokers.³⁴
20. *Thirteenth*, AHL had an established system and process of routine or targeted "*second line file reviews*" conducted by the Compliance Team, which were also capable of detecting, and thus helping to deter, fraud or misconduct by Aussie Brokers.³⁵ In 2014, AHL's compliance team conducted a review of almost 1200 files to identify Aussie Brokers not meeting AHL's standards and expectations for good sales conduct and positive customer outcomes, and particular areas requiring improvement.³⁶
21. *Fourteenth*, AHL had an established system and process requiring all physical files to be *scanned* within 5 working days, so as to create an electronic record that could be reviewed by "*first line*" or "*second line*" compliance (at any time, without notice to the Aussie Broker), and which record could be produced to the customer and/or AHL panel lender. The necessity of complying with this electronic record requirement was reinforced in AHL communications to Aussie Brokers.³⁷
22. *Fifteenth*, AHL signaled its disapproval of Aussie Brokers' non-compliance with this electronic record requirement by imposing penalties (withholding commissions, and suspending access to AHL's loan assessment and application systems) for failure to achieve compliance with scanning requirements.³⁸
23. *Sixteenth*, AHL encouraged proactive monitoring by its operational managers by rewarding with bonuses the satisfactory completion of "*first line*" compliance activities by MBLs and RBCs.³⁹
24. *Seventeenth*, the contention that AHL's systems, processes and culture "*permitted*" fraudulent conduct to occur is unsustainable in particular when considering it was those systems, processes and culture that uncovered and terminated the fraudulent conduct of Mr Meehan in 2015.

³³ L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-12 [AHL.0001.0002.0038].

³⁴ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [181]-[187].

³⁵ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [181]-[187].

³⁶ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [186].

³⁷ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [182]; see also LH-16 [AHL.0008.0014.1705] [AHL.0008.0014.1725]. AHL's requirement was above that mandated by law. The record keeping obligation of an Australian Credit Licensee only relates to financial records (defined in s 100 as invoices, receipts, documents of prime entry, and trust account statements and reports): s 88(2). The NCCPA does not impose any general record keeping obligations on a licensee, other than an ability to provide records of the unsuitability assessment on request for 7 years: ss 120(1); 132(2); 143(1) and 155(2).

³⁸ L Harris [Ex 1.41] [CBA.0517.0003.0001] at LH-16 [AHL.0008.0014.1705] [AHL.0008.0014.1725]; also T431.6-.31 (G Boddy). See also L Harris [Ex 1.41] [CBA.0517.0003.0001] at [186].

³⁹ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [187].

- (a) Mr Meehan's fraudulent conduct was uncovered by AHL in February 2015, after AHL's Compliance Manager conducted a file review of Mr Meehan's files.⁴⁰ Mr Meehan's files were selected for review as part of AHL's targeted reviews for all brokers submitting over 50% of customers' loan applications to one lender. Mr Meehan had submitted over 50% of customers' home loan applications to Westpac in the context of AHL's knowledge that Westpac's credit assessment processes accepted letters of employment to be used for income verification.⁴¹ This was in the context of Ms Khalil having been found to use falsified letters of employment with Westpac.⁴² The significance of using such indicia as a potential 'trigger' to uncovering potential misconduct was acknowledged by Counsel Assisting.⁴³
- (b) AHL's Compliance Manager identified that Mr Meehan had a 53% submission rate with Westpac and, upon reviewing the electronically scanned loan files, also identified that many of the pay slips supporting the loan applications were in the same format.⁴⁴ After a preliminary report dated 10 February 2015 was sent to the State Manager and copied to the CEO regarding commonalities and discrepancies suggestive of fraud, a meeting was conducted on 17 February 2015 with Mr Meehan.⁴⁵ After an Incident Report was provided to the AHL Risk Committee on 20 February 2015,⁴⁶ the matter was referred to the Risk Committee for disciplinary and other action.⁴⁷ On 25 February 2015, AHL suspended its agreement with Mr Meehan's company, and the arrangement was terminated on 6 March 2015.⁴⁸
- (c) As soon as practicable after AHL became aware of the misconduct, AHL called nine customers whose home loan applications were suspected of being affected by Mr Meehan's conduct and left voicemail messages.⁴⁹ None of the messages were returned by those customers. Otherwise, AHL reallocated AHL customers of Mr Meehan to another Aussie Broker and directed the relevant broker to contact customers and, if appropriate, resubmit affected home loan applications.⁵⁰
- (d) Notifications were made in March and April 2015 as follows:

⁴⁰ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [142].

⁴¹ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [142] – [143].

⁴² L Harris [Ex 1.41] [CBA.0517.0003.0001] at [71].

⁴³ In cross-examination by Counsel Assisting of Ms Harris at T371.39-372.42, and in closing address.

⁴⁴ L Harris [Ex 1.41] [CBA.0517.0003.0001]; [Ex 1.64] [AHL.0005.0001.1654] at [144].

⁴⁵ L Harris [Ex 1.41] [CBA.0517.0003.0001]; See [Ex 1.64] [AHL.0005.0001.1654] at [146] – [149].

⁴⁶ [Ex 1.65] [AHL.0005.0001.1954].

⁴⁷ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [151] and [153] – [154].

⁴⁸ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [157] – [158].

⁴⁹ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [155].

⁵⁰ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [156].

- i. in March 2015, AHL notified AHL panel lenders that Mr Meehan’s appointment as credit representative of AHL had been terminated under “adverse circumstances” and requested lenders to review all loan applications;⁵¹
 - ii. on 10 April 2015, AHL notified the MFAA of Mr Meehan’s termination under “adverse circumstances”;⁵²
 - iii. on 10 April 2015, AHL notified ASIC of Mr Meehan’s termination under “adverse circumstances”;⁵³
 - iv. AHL did not notify the Police in relation to Mr Meehan’s conduct; however, the Risk Committee noted that AHL anticipated that ASIC would commence criminal proceedings against Mr Meehan.⁵⁴ This was further to AHL’s notification under adverse circumstances and subsequent document production to ASIC.
25. AHL’s detection of, and response to, Mr Meehan’s misconduct during early 2015 plainly demonstrates the effectiveness of its policies, procedures, systems and risk culture evident at AHL at that time. The conduct of targeted file reviews on specific indicia resulting in detection demonstrates the effectiveness of AHL’s monitoring systems. Had AHL’s policies, procedures, systems and culture ‘permitted’ fraudulent conduct, Mr Meehan’s misconduct would not have been detected and his broker arrangements would not have been terminated by AHL.
26. The submission that AHL ought to have also detected the conduct of the other three of the Four Brokers belies the fact that:
- (a) AHL’s procedures, systems and culture in 2014 were not significantly different to the procedures, systems and culture in February 2015;
 - (b) AHL evidently had the capability to detect fraudulent conduct in 2014, as it did in February 2015;
 - (c) the fact that an AHL panel lender detected the misconduct of three of the Four Brokers *before* AHL is not a sound basis to assume that AHL could or would never have independently detected the misconduct based on its systems then in place.
27. Counsel Assisting’s criticism comes down to one which contends there must have been a breach of AHL’s obligations because AHL did not detect the misconduct *first*, or, at least, *before* the AHL panel lender did. Yet, in each case, the AHL panel lender only “detected” the fraud after approving, and in the majority of instances settling, the loans and only because of coincidental interactions between the customers and branch staff. That is, the AHL panel lenders detection was not because of any systematic review, any credit assessment conducted as part of its responsible

⁵¹ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [160].

⁵² L Harris [Ex 1.41] [CBA.0517.0003.0001]; [Ex 1.66] [AHL.0005.0001.1816] at [161].

⁵³ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [163].

⁵⁴ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [167].

lending obligations, or any identification of false documentation, as occurred in the case of AHL's detection of Mr Meehan's fraud. That is not a proper basis for a finding of breach.

28. The contention that AHL's systems for prevention and detection of fraud were inadequate because they failed to "*implement systems that proactively and routinely [identify Aussie Brokers] who were potentially taking advantaging of the more lax verification requirements of lenders by submitting falsified documents*" (cf T986.1-4) fails to have regard to AHL's systems, processes and culture having identified to AHL panel lenders anomalies/trends with lodged loan applications by Mr Meehan.
29. Indeed, it was also those systems, processes and culture that in 2017 enabled AHL to detect the misconduct of Aussie Broker, Travis Truter, which misconduct AHL reported to ASIC, the MFAA and Victorian Police.⁵⁵ AHL's successful detection of and response to loan application anomalies and trends, and Mr Truter's misconduct, supports positive findings as to the effectiveness of AHL's policies, procedures, systems and risk culture.
30. The review and analysis of indicia to detect anomalies, potentially indicating misconduct, has been enhanced through the design, testing and initial implementation of the Aussie Broker Dashboard.⁵⁶ This contains near real-time data which is capable of regular monitoring by "first line compliance" (being franchisees, RBCs, MBLs, State Managers, and Quality Assurance Specialists) as well "second line compliance" (AHL Risk and Compliance Team and AHL Customer Dispute Resolution Team). The Aussie Broker Dashboard will use the data from AHL's systems to analyse the following key indicia: lender concentration of applications, conversion of loan applications to settlements, percentage of declined applications, percentage of withdrawn applications, percentage of discharged applications, instances where living expenses reported below Household Expenditure Measure (**HEM**), high level of requests for additional information by lenders, percentage of interest only loans, percentage of investment property loans, percentage of applications in which the loan-to-value ratio (**LVR**) is greater than 80%, percentage of settled loans discharged under 24 months; and location of brokers compared to state in which customer resides.
31. Use of indicia such as lender concentration, indicating potential exploitation of weaknesses in lender requirements, was evident in the case of Mr Meehan. Consequently, the use of such indicia as a 'trigger' for in-depth file reviews is not novel. Although the Aussie Broker Dashboard represents a highly powered, automated, "real-time" capacity for data analytics of such indicia through a centralised system, it is an enhancement of systems that AHL submits were *already* adequate and reasonable. The dashboard is neither a necessary, nor the only, system or procedure by which compliance with the statutory obligation can be achieved (cf T419.13-419.20).

⁵⁵ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [210] – [216].

⁵⁶ G Boddy [Ex 1.73] [AHL 0008.0020.0053] at [11]-[24].

AHL did not prioritise selling home loans over a proper customer assessment

32. The contention that the culture within AHL “*prioritised selling of home loans over the proper assessment of the customer’s requirements and objectives for the purpose of identifying and recommending a loan product that was not unsuitable for the customer*” (T985.36-.44) or that AHL (inferentially) breached its obligation under s 47(1)(b) of the NCCPA to have in place adequate arrangements to ensure that AHL clients were not disadvantaged by any conflict of interest that may arise (*cf* T984.10-.14) is unsustainable.
33. *First*, there was no suggestion put to AHL’s General Manager of People and Culture that the training program for these Four Brokers was inadequate in prioritising the proper assessment of the customer’s requirements and objectives for the purpose of identifying and recommending a loan product that was not unsuitable for the customer.
34. *Second*, AHL’s accreditation requirements (both initial and ongoing) mandated that Aussie Brokers prioritise the proper assessment of the customer’s requirements and objectives for the purpose of identifying and recommending a loan product that was not unsuitable for the customer.
35. *Third*, AHL’s mentoring program and “first line” file reviews operated as a disincentive to Aussie Brokers who prioritised selling of home loans over the proper assessment of the customer’s requirements and objectives for the purpose of identifying and recommending a loan product that was not unsuitable for the customer.
36. *Fourth*, to the extent the proposition that it might be contended that there was such a “culture” by reference to the outcomes of risk culture surveys of AHL employees (but not of Aussie Brokers), this would fundamentally misunderstand the nature and limitations of such exercises. A survey of risk culture speaks only to the *perceptions* of those surveyed; it neither proves that misconduct had occurred in the past, nor is it a reliable foundation for predictions of conduct in the future.
37. *Fifth*, in any case, and notwithstanding matters arising from the risk culture surveys or the current remuneration structure, AHL’s customers’ arrears rate runs at 1% in line with that of banks with a leverage rate no higher than industry average.⁵⁷ This suggests that customer assessments were, and continue to be, adequate and appropriate and tells against a conclusion that loans are being processed by Aussie Brokers inconsistently with their responsible lending obligations.
38. *Sixth*, to the extent that remuneration, merely by the way that it is *structured*, allegedly provides incentives for brokers to seek particular outcomes in substitution for others, as a matter of logic, the following ought also be acknowledged:
- (a) trail commissions create an incentive for the broker to ensure the customer can service the loan long term;
 - (b) trail commissions and clawback⁵⁸ create an incentive for the broker not to recommend early term “switching” or “churn”;

⁵⁷ T426.18-427.24 (G Boddy).

⁵⁸ This can require a broker to repay any upfront commission for loans which enter into arrears or are refinanced within between 18 and 24 months: see T426.18 – 426.20 and 426.27 – 426.28. Loans that default or discharge

- (c) the cessation of trail commissions when a loan is in default or in hardship⁵⁹ and the calculation of the volume of loans an Aussie Broker writes excluding defaulted loans⁶⁰ creates an incentive for brokers to recommend high quality loans which customers can service without hardship.⁶¹

39. A contention that volume and value based upfront and trail remuneration, of itself, results in a culture that prioritises sales over responsible lending, fails to appreciate that trailing commissions are not paid in respect of loans in default or in hardship. To the extent that trailing commissions can be said to provide incentives or disincentives for Aussie Broker misbehaviour, self-evidently, the risk of default is a powerful disincentive to over-extending the customer. To similar effect, as small businesses operating in their local community, Aussie Brokers are incentivised to pursue outcomes which result in satisfied customers over the long term, and ultimately repeat and referral business. Overextended customers who face the risk of default or repossession will not be ‘satisfied’ customers. That is, it is in the Aussie Brokers’ personal interests to prioritise customers being able to service the loans for which they apply. Consequently, as a matter of logic, pursuing higher volume and value, if it is at the expense of serviceability, does *not* correlate to commissions ultimately earned, or the sustainability of Aussie Brokers’ businesses.

40. A contention that upfront commissions (or indeed, a flat fee for service), with no trail, is a preferable remuneration structure as it does not incentivise an Aussie Broker assisting customers to apply for loans repayable over a longer time period, fails to appreciate:

- (a) upfront commissions *with no trail* provides an incentive to brokers to recommend early term “switching” or “churn” with the additional costs that may impose upon customers in terms of break fees, application fees and similar;
- (b) upfront commissions *with trail* provides an incentive to brokers to recommend loans that will suit the customer for the long term (given any refinancing carries with it the revocation of the trail); and
- (c) standard home loan terms set by lenders are 25 or 30 years and there is no capacity for brokers to seek extensions to this;

within 6 to 12 months can result in clawbacks of upfront commissions of between 75% to 100%: D Smith [Ex 1.78] [AHL.0011.0001.0001] at [63(e)] and at Ex DS-09 [AHL.0008.0010.0160], page [AHL.0008.0010.0235].

⁵⁹ D Smith Exhibit 1.78 [AHL.0011.0001.0001] at [60] and Ex DS-09 [AHL.0008.0010.0089] (Aussie 2016 Core Independent Contractor Agreement - Aussie Consultant) at pages .0105 and .0116 and .0118 “default loans”; clause 5.1: *No Upfront Commission or Loyalty Bonus will be payable by Aussie to you pursuant to this Schedule or otherwise in respect of a default loan*]. For Broker Agreement - Aussie 2016 Core Independent Contractor Agreement - Aussie Representative: See D Smith [Ex 1.78] [AHL.0011.0001.0001] at Ex DS-09 - [AHL.0008.0010.0124] at .0154.

⁶⁰ D Smith Exhibit 1.78 [AHL.0011.0001.0001] at [60]. In addition, loyalty bonuses do not accrue in respect of loans in default, see Aussie Centre FY 2017 Franchise Agreement D Smith [Ex 1.78] [AHL.0011.0001.0001] at Ex DS-09 [AHL.0008.0010.0160] at .236 (Schedule C, 2.4); Aussie 2016 Core Independent Contractor Agreement - Aussie Consultant [AHL.0008.0010.0089] at.0118 (Schedule A, 5); Aussie 2016 Core Independent Contractor Agreement - Aussie Representative [AHL.0008.0010.0124] at .0154 (Schedule A, 6)

⁶¹ Loans submitted by Aussie Brokers which have defaulted account for approximately one per cent (1%) of the total loans applied for via an Aussie Broker, which is the same as most banks default loans, tells against a conclusion that loans are being applied for by Aussie Brokers which are inconsistent with responsible lending obligations: see T427.13 – 427.16.

- (d) a flat fee structure may encourage a culture of promoting multiple smaller loans to obtain additional fees, leading to more complex financial structures for customers, and incentivise brokers to recommend loans irrespective of customer suitability or serviceability; and
 - (e) trail commission also recognises that Aussie Brokers continue to provide service *after* settlement, including reviewing customer positions (such as to determine whether variations are warranted) and acting upon instructions, (for example, to switch the loan from variable to fixed when market conditions change).⁶²
41. *Seventh*, the legislative scheme imposes a requirement on lenders, as credit providers, to conduct their own inquiries and verification of the customer's financial position including serviceability. ASIC's RG209 does not require duplication of review or effort by AHL (whose brokers are only required to undertake a preliminary assessment in any event) and indeed recognises that the responsible lending obligations for credit providers and credit assistance providers are set out in different provisions of the NCCPA. In ASIC's view, this reflects their different roles in the credit application process, and that what amounts to a reasonable level of inquiries and taking reasonable steps to verify differs (and is scalable) depending on the type of services provided to customers.⁶³
42. *Lastly*, AHL concedes that Aussie Brokers' contractual obligation to introduce a minimum performance requirement of 6 settled loans per month imposed a duty which *could* conflict with their obligation to comply with the law, including the responsible lending obligations. However, contrary to what seems to be suggested by Counsel Assisting (*cf* T.984.16-.14) the existence of such a potential conflict cannot give rise, *ipso facto*, to a breach of s 47(1)(b) of the NCCPA by AHL. The statutory obligation does not mandate the elimination of conflicts altogether. There is no evidence before the Commission that the minimum performance requirement motivated the fraudulent conduct. Further, and in any event, AHL adequately managed the risk to customers (*cf* T984.21-.23) and took reasonable steps to ensure that its representatives complied with the NCCPA (*cf* T984.19-.21) by (as explained above) contractually mandating that Aussie Brokers prioritise their compliance with the law, adequately training and monitoring, incentivising compliance, and disincentivising non-compliance, of staff with responsible lending requirements.

AHL adequately responded to the potential detriment suffered by customers

43. AHL adequately responded to the potential detriment suffered by customers (*cf* T986.16-.24). Each of the Four Brokers was terminated by AHL. AHL notified AHL panel lenders of the termination and instructed them to conduct reviews of all pending and settled loan applications. In cross-examination, it was not suggested that AHL panel lenders would conduct further, or better, reviews had the AHL panel lender also been advised that the reason for the termination was fraud. In any case, the AHL panel lenders were on notice of potential irregularities given that AHL's

⁶² T320.42- 321.20 (L Harris).

⁶³ ASIC RG 209. [209.23]-[209.27].

notification did not include a “no adverse circumstances” stipulation in accordance with industry practice at the time.⁶⁴ There is no evidence before the Commission to suggest that the AHL panel lenders did not understand the purpose of the notifications, notwithstanding they were made without express reference to the nature of the circumstances surrounding a particular broker’s termination. In any event, in relation Ms Khalil, Mr Nair and Mr Meehan, AHL notified its panel lenders of the terminations of the respective brokers via emails sent from “AMAACcreditation@aussie.com.au” which were bcc’d to those lenders. These emails included a positive stipulation that the termination was under adverse circumstances.⁶⁵

44. AHL’s knowledge of how many of the customers of the Four Brokers were affected by their fraudulent conduct is based on the information provided by the regulator, which was based on its own comprehensive assessment, and informed by its exercise of investigatory powers unavailable to AHL (*cf* T986.21-.21). AHL did respond adequately to the complaints raised by customers, including, in one case, making an *ex gratia* payment to a customer in recognition of the poor customer experience. It is not the case that AHL “*was unable to explain the basis for the ex gratia payment, the sum of the ex gratia payment, or provide any details about it*” (T.985.5-.6). The submission overlooks material provided to the Commission by AHL under notice, and the limitations of the personal knowledge of the witness through whom Counsel Assisting sought to explore the matter.⁶⁶ The *ex gratia* payment to the customers arose in circumstances where:

- (a) loan approval for those customers had been withdrawn by Westpac due to the fraud of Mr Nair. One of the customers complained that, as a licensed real estate agent, he was concerned about being wrongfully connected to Mr Nair’s fraud. The customers were also assessed to be in a situation where they had an unconditional contract of purchase without a loan approval or funds to settle. This potential detriment was resolved as they obtained approval for a loan from CBA and the purchase proceeded without any time extension;⁶⁷
- (b) the customers sought the difference between the lower repayment amount on the Westpac loan organised through AHL (with the false supporting documents), and the higher repayment amount on the subsequent CBA loan (using documents which represented their actual financial position). In essence, the customers’ “complaint” was that AHL ought to compensate them because they were “worse off” when a credit decision was made on the basis of their actual financial position;

⁶⁴ At T316.39- 317.20 (L Harris).

⁶⁵ See Table of Misconduct provided to the Commission on 23 March 2018.

⁶⁶ At T370.21, Ms Harris indicated her assumption that the *ex gratia* payment reflected “financial loss for that customer”. However, in the same answer, Ms Harris explained that she was not part of the investigation resulting in the decision to make the payment. In addition, Ms Harris admitted she was unable to provide detail regarding the reason for the complaint or the *ex gratia* payment and indicated that she would need to refer to further documents to be in a position to answer the questions posed: T370.29-371.21. Her witness statement also clearly disclosed the limitations of her personal knowledge in relation to the 4 fraudulent brokers, and her reliance on the review she had made of AHL’s files. The Head of Risk and Compliance (Tara Laybutt) and the former Chief Executive Officers from this period (Ian Corfield and John McDonald) are no longer employed by AHL.

⁶⁷ [AHL.0005.0001.1801] (internal email dated 21 July 2014 re “Customer complaint – Jackson”).

- (c) the customers also sought damages in having to organise the loan themselves due to Mr Nair's conduct throughout the loan application process; and
- (d) AHL made an 'offer of goodwill' amounting to \$13,500⁶⁸ which was paid by AHL on a 'without admissions' basis pursuant to a formal deed of settlement.⁶⁹

AHL adequately responded to the danger posed to other future customers by its reporting of misconduct

- 45. AHL adequately responded to the danger posed to other future customers of the Four Brokers. Contrary to Counsel Assisting's contention, AHL did not "fail" to report the details of the misconduct to law enforcement authorities, regulators, professional disciplinary bodies (*cf* T986.26-.34).
- 46. There was also no "failure" to report, since ASIC does not require mandatory reporting by credit licensees of breaches by credit representatives, nor does ASIC facilitate such disclosures through the mandatory reporting which it does require (ASIC's Form CI31 does not make provision for a credit licensee to provide details of the reasons for or circumstances surrounding a broker's cessation as a credit representative): *cf* T983.24-.29. ASIC's position paper "*Self-reporting of contraventions by financial services and credit licensees*" (11 April 2017), apprehends (at p 5) that there would be "*a large regulatory burden on licensees, and an administrative burden on ASIC in having to deal with an influx of minor and insignificant reports*"; and the introduction of a "significance" test to mark the threshold of severity of breaches which ought to be reported "*has given rise to ambiguity*". Any extension of the regime in section 912(d) of the *Corporations Act* 2001 (Cth) to Australian credit licensees would presumably need first to resolve those concerns (*cf* the Commissioner's questions at T.987.19-.21).
- 47. There is no evidence before the Commission to warrant a finding that ASIC or the police were limited or restricted in any way from exercising their investigatory or enforcement powers (*cf* T.986.27-.30). AHL responded to all notices issued by ASIC concerning its investigations into the Four Brokers. It was also reasonable that AHL did not report the matters to police, given that ASIC has all necessary powers to investigate both civil and criminal matters.
- 48. Bankwest confirmed it had notified MFAA of Mr Sahay's termination as an accredited broker at the same time as it notified AHL.⁷⁰ Responding to the danger posed to future customers did not require subsequent duplicate notifications by AHL. In any event, contrary to the submission at T983.34-.39, AHL did not breach its obligation as a member of MFAA, as it informs the Commission that it did report the termination of the brokers via emails sent from "AMAACcreditation@aussie.com.au" bcc'd to MFAA.⁷¹ Accordingly, no finding should be made

⁶⁸ [AHL.0002.0001.0074] (email from Customer Dispute Resolution to Bell Legal dated 9 September 2014).

⁶⁹ An unsigned copy of the deed was produced to the Commission in response to NP-009 [AHL.0002.0001.0075]. The recitals record the customers' claims.

⁷⁰ [AHL.0002.0001.5025] and [AHL.0002.0001.5026].

⁷¹ See Table of Misconduct provided to the Commission on 23 March 2018.

that AHL failed to take adequate steps to ensure MFAA was put in a position to exercise its powers (*cf* T.987.19-.21).

AHL appropriately advised customers

49. AHL's conduct did not fall below community standards and expectations in its dealings with customers whose loans had been submitted by one of the Four Brokers, and which had been approved. In particular, it did not "fail" to advise those customers of the termination of their relationships with those Four Brokers and the reasons for the termination of those relationships. Such a contention suggests a positive obligation to do so, yet such a contention does not take account of the following matters.
50. *First*, it would not be appropriate to implement, as standard practice, a requirement to inform all customers of the brokers of potential fraud in circumstances where it may be suspected that the customers themselves have perpetrated or are complicit in the fraud.
51. *Second*, it may sometimes be in all customers' interests for the extent of the fraud to be uncovered (if, for example, it appears to be part of a system with multiple participants) and this may require a period of discreet monitoring.
52. *Third*, uncovering one instance of fraud does not automatically mean that all of the relevant broker's applications are so tainted.
53. *Fourth*, it would be imprudent to jeopardise the smooth transition of a home loan to settlement which is otherwise regular and meets all serviceability requirements.
54. *Fifth*, each potential case of fraud must be treated sensitively and must be appropriate to the particular circumstances apparent at the time of detection including being mindful that the customer, and not the broker, may be the origin of any documents that have been falsified. The potential risk of contacting customers regarding fraud is borne out by the example of Bankwest. There, Bankwest contacted a customer and appears to have made allegations of fraud regarding the Aussie Broker *and* that customer. The distress exhibited by the customer⁷² squarely demonstrates the risk in Bankwest making that communication and informing that customer of potential fraud in circumstances where it has not yet been (and may ultimately not be) proven. It did not assist the customer to have those issues ventilated with them at that time. Consequently, it is inappropriate to say that it would always be in the customer's interest to be advised of the fact that there are investigations into potential fraud in relation to their loan application.⁷³

⁷² T983.45 (Counsel Assisting); at T326.3-39, Ms Harris was cross-examined about the email chain [AHL.0002.0001.4701] at [AHL.0002.0001.4706] [Ex 1.47] between the broker, Ms Goode, and AHL's Mobile Sales Manager, Ms Tomkins, but not the balance of the email chain which demonstrates that the matter was escalated within AHL and ultimately resolved, in conjunction with Bankwest, by Mr Magnus of Bankwest confirming that "*as discussed with Melanie today, Aussie will call the customer to smooth over the issue below, the issue caused by our fraud team completing the review.*"

⁷³ This approach was confirmed by Ms Harris when cross-examined regarding one other customer interaction: "*in this situation, our focus needs to be on the customer to see whether we can possibly get some solution for this customer*" (T342.39-.40). See also T343.30-.35.

55. *Sixth*, only once the offender is identified as the broker acting *alone* and the extent and nature of the misconduct is sufficiently proven, can different considerations apply.
56. *Seventh*, despite undertaking investigations and enforcement action in respect of three of the Four Brokers, ASIC did not instruct AHL to make any notification to customers pursuant to Condition 2 of AHL's Australian Credit Licence.⁷⁴ The risks of untimely notification to customers are implicitly recognised by these licence limitations. In any event, AHL did notify the public generally of the conviction of Mr Nair by media releases issued to media outlets and noted, at board level, that ASIC had issued media releases with respect to Ms Khalil, Mr Nair and Mr Meehan.⁷⁵

AHL did not prioritise retention of its trailing commissions

57. AHL did not prioritise the retention of its trailing commissions from the Aussie Brokers' home loan portfolio over investigating and dealing with the conduct that led to the termination of the Four Broker, or ensuring that such conduct had not led to any detriment for a customer.
58. The evidence indicates the process for dealing with that misconduct was to:
- (a) suspend the brokers from AHL's systems and from submitting loan applications;⁷⁶
 - (b) advise AHL panel lenders of AHL's termination of the broker;
 - (c) advise AHL panel lenders to conduct a review of pending and settled loan applications tied to the broker;
 - (d) reallocate the customers' applications to other Aussie Brokers, including requiring re-verification of supporting documents and the withdrawal of all applications which could not be verified as unaffected by the broker misconduct;⁷⁷ and
 - (e) follow up any issues arising, including making Incident Reports and detailing the incidents of the fraud for later risk assessment and review, and escalation to the Executive Risk Committee and Board (*cf* T984.22-27).

⁷⁴ D Smith [Ex 1.78] [AHL.0011.0001.0001] at Ex DS-3 [AHL.0008.0001.0503] at page [AHL.0008.0001.0504]: if ASIC makes a banning order against a current or former representative or the court makes an order disqualifying a person who is a current or former representative AHL must, *if instructed by ASIC*, take all reasonable steps to provide the following information in writing to any person in relation to whom the representative engaged in a credit activity on behalf of the licensee within a period of 3 years before the order was made: (a) the name of the representative; (b) the representative's credit representative number (if any); and (c) AHL's contact details for dealing with any enquiries or complaints regarding the banning or disqualification or the conduct of the representative.

⁷⁵ Including *Australian Financial Review*, *The Australian*, *The Advisor*, *Sydney Morning Herald*, *The Age*, *Canberra Times* and *Australian Broker*: [AHL.0001.0001.5034] (Media Release re Nair dated July 2016); L Harris Ex 1.41 [CBA.0517.0003.0001] at [98]-[99], [131], [136]-[138], [171]-[174].

⁷⁶ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [78(c)] and [109] and [157].

⁷⁷ L Harris [Ex 1.41] [CBA.0517.0003.0001] at [49] and [78(d)] and [121(c)] and [156].

59. The documents referred to by Counsel Assisting in the course of cross-examination of AHL's General Manager of People and Culture (in the relevant period, General Manager of Human Resources) related to:

- (a) the inquiries made by one of the alternate Aussie Brokers taking responsibility for verification and, if appropriate, resubmission of the loan application (not being AHL itself). There was nothing inappropriate in that alternate Aussie Broker being concerned to ensure that she was attached to the loan application for the purposes of receipt of commission;⁷⁸
- (b) an action plan agenda⁷⁹ which referred to a number of events, *first* of which was reallocating customers to other Aussie Brokers with instructions to re-verify supporting documentation. Indeed, by the time the action plan agenda was circulated, this item is recorded as having been completed with a status list remaining to be compiled (*second* item). The *third* item was to ensure that lenders were not applying bias to processing other bona fide applications of AHL customers which was to ensure that the customers with valid documentation were not disadvantaged by the fact that their Aussie Broker, Mr Sahay, had submitted fraudulent documentation in other loan applications⁸⁰. These matters indicate that AHL's focus and primary concern was on assisting customers with their applications and ensuring that service to the customer remained uninterrupted;
- (c) a "panel lender summary" document.⁸¹ This was a single document, which:
 - (i) was created some 3 months after termination of Mr Sahay's appointment as a credit representative and the implementation of the action plan, including assisting customers with pending application, was well advanced;
 - (ii) focused on AHL panel lender actions in response to Mr Sahay's misconduct, including in relation to payment of trail commissions and notification of the lenders' mortgage insurer;
 - (iii) proposed steps to challenge the reasonableness and legality of Bankwest ceasing trail commission on the *entire* loan portfolio of Mr Sahay rather than just that part of the loan portfolio shown to be affected by the misconduct.⁸² There was nothing inappropriate in considering the financial impact of broker misconduct in the context of the company's obligations to its shareholders; indeed, it would be surprising had AHL not done so. There is nothing to suggest that this concern was prioritised over concerns regarding customers.

⁷⁸ [AHL.0002.0001.4786] [Ex 1.46]; At T322.40-323.40, Ms Harris was cross-examined on the document being an email communication between Melanie Tomkins (a Mobile Sales Manager) and Melissa Goode (a mobile broker) on the basis that it was "*an internal email between two members of Aussie*". At T311.33-.34 Ms Harris explained mobile brokers tend to be "*single operators in their own business*".

⁷⁹ [AHL.0002.0001.4772] [Ex 1.50].

⁸⁰ T329.17-.29, this also supports a finding that the lenders were aware of the serious allegations against Mr Sahay at the time.

⁸¹ [AHL.0002.0001.2456] [Ex 1.51].

⁸² Ms Harris acknowledged that if a particular loan were deemed to be fraudulent then the trail commission would not be payable (T317.24-.28).

Concerns with trailing commission were dealt with as *one of a number* of elements being addressed at the time.⁸³

AHL's lodgement of its 2014-2015 Annual Compliance Certificates

60. AHL's conduct in lodging annual compliance certificates certifying certain matters including that AHL had adequate arrangements and systems in place to address conflicts of issues, NCCPA compliance and risk management did not fall below community standards.
61. *First*, the proposed adverse finding ought not be made on the basis of matters put to AHL's General Manager for People and Culture in cross-examination, given the witness:⁸⁴
- (a) explained that she was not part of the compliance team at AHL;⁸⁵
 - (b) did not make a declaration of compliance in any event;
 - (c) was not asked to attest to the basis upon which other members of AHL management signed the compliance certificates.⁸⁶
62. In any case, while the witness accepted that AHL's processes had not *detected* 3 instances of misconduct in 2014, she confirmed her understanding that, at that time, AHL was following its process of reviewing files, implementing a rigorous compliance program, and had cultivated the expectation in the business and among Aussie Brokers that if they did the wrong thing, the broker arrangement would be terminated.⁸⁷ In addition, AHL's new Chief Financial Officer disagreed with the proposition that the basis for signing the Compliance Certificates was deficient, and confirmed his understanding that there were adequate systems in place, but also that they could improve.⁸⁸
63. *Secondly*, AHL has been operating successfully for over 20 years. Over that 20 year period there have been over 5,000 Aussie Brokers engaged in mortgage broking as credit representatives of AHL at various times across all states and territories in Australia, including rural and regional areas.⁸⁹ All AHL Franchises are small businesses with approximately one quarter being family run businesses.⁹⁰ All Aussie Mobile Brokers are small businesses.⁹¹ Over the period, Aussie Brokers

⁸³ T336.19-.20.

⁸⁴ T383.22-384.46. Ms Harris explained that she was "superficially familiar" with the style of document being the Compliance Certificates (at T384) and further stated "*I am not responsible for filling in the form, so I don't know how those clauses need to be interpreted*" (at T384.45-.46).

⁸⁵ T312.1-4 (L Harris); L Harris [Ex 1.41] [CBA.0517.0003.0001] at [1] and [8].

⁸⁶ The proposed witness outline provided by the Solicitors Assisting the Commission required only that the compliance certificates be attached to the statement; see letter dated Tuesday 27 February 2018 sent from the Commission at 5:40pm.

⁸⁷ T 347.12-.18 (L Harris).

⁸⁸ T 419.22-.31 (G Boddy).

⁸⁹ D Smith [AHL.0011.0001.0001] and Exhibit DS-1, [AHL.0008.0001.0500] at [19].

⁹⁰ D Smith [Ex 1.78] [AHL.0011.0001.0001] at [13].

had been subject to extensive training, accreditation and compliance checks as detailed above. The identification of fraudulent conduct over the course of 3 years, could not, in and of itself, mean that AHL's management ought not to have signed, and caused to be lodged, the annual compliance certificates.

64. *Thirdly*, AHL does not accept, given the totality of the material before the Commission, that there was not a proper basis for the signing of the compliance certificates. Importantly, to the extent that the NCCPA reflects community expectations, that legislation does not demand credit licensees conduct *faultless* operations. Section 47 of the NCCPA (on which the attestations in the annual compliance certificates are based) differentiates the position of ADI or APRA regulated bodies and the position of licensees who, not being credit providers, engage in activity that involves a lower risk profile (both to the customer and public generally). In this respect, the requirement that the licensee must have "available *adequate* resources" to carry out supervisory arrangements and "*adequate* risk management systems"⁹² means adequacy for the nature, scale and scope of the licensee's operations. AHL's operations and obligations are not complex; AHL is a credit *assistance* provider, not a credit provider (as would a lender be).
65. Moreover, there is no suggestion in either the NCCPA, nor the terms of the compliance certificates themselves, that credit assistance providers must have risk management systems or supervisory arrangements that *eliminate any and all actual and potential* fraud and misconduct, such that fraud or misconduct by a credit representative means the licensee is be found *ispo facto* non-compliant.
66. In any event, the uncovering of fraud, as was the case with Mr Meehan, and indeed, more recently Mr Truter, confirms that AHL's arrangements meet both community expectations and the requirements of the NCCPA.
67. The additional measures put in place since Mr Meehan's detection means that the prospects of AHL's systems and processes ensuring AHL complies with regulatory requirements of the NCCPA and meets community expectations are even higher.

Dated: 3 April 2018

⁹¹ D Smith [Ex 1.78] [AHL.0011.0001.0001] at [14].

⁹² Section 47(a)(l) of the NCCPA.